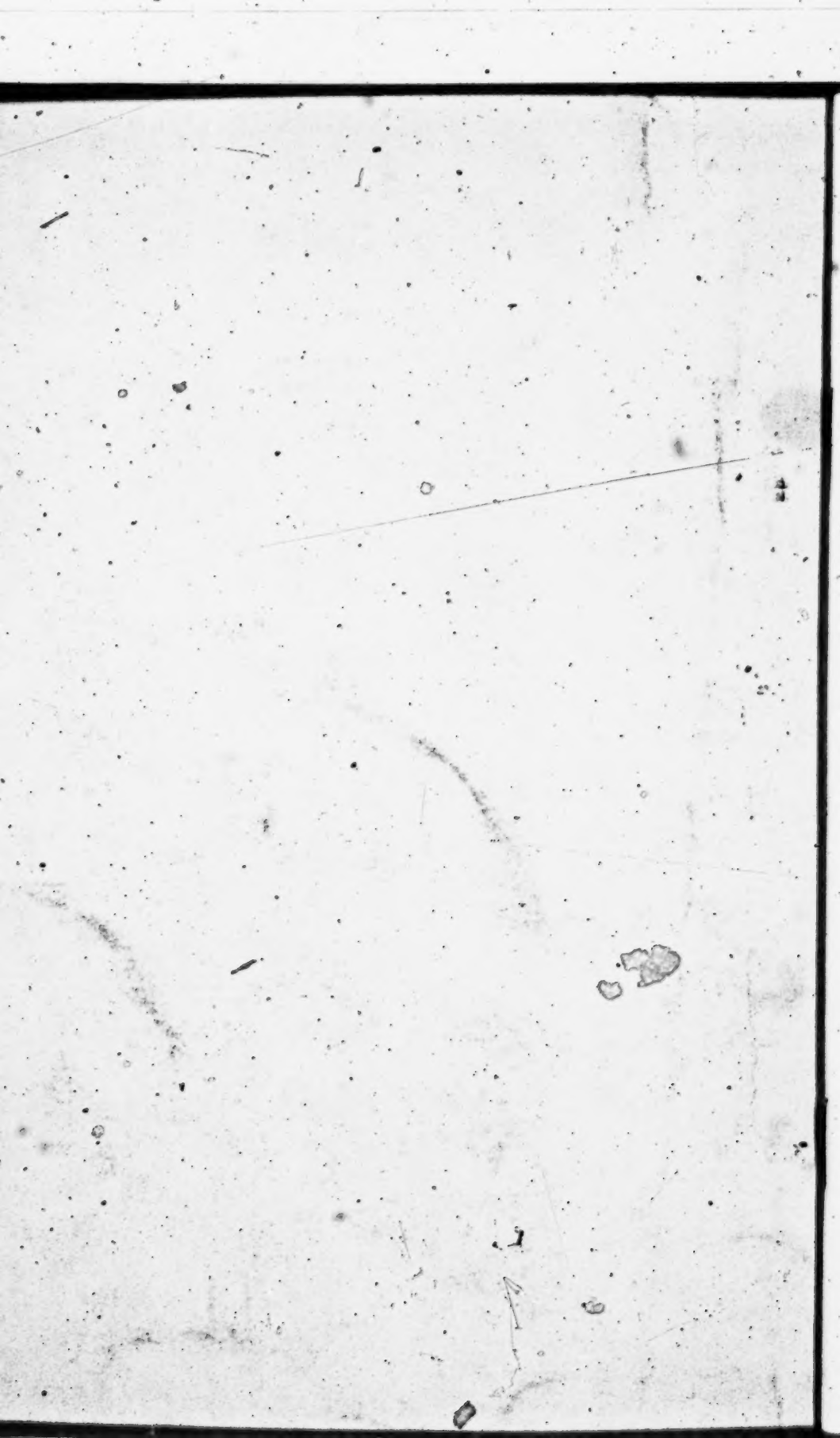

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 30 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 314

CLIFFORD H. RAY, Petitioner,

v.

SEABOARD AIR LINE RAILROAD COMPANY,
Respondent

On Petition For Writ of Certiorari to the District Court of Appeal of Florida, First District

BRIEF IN OPPOSITION

JOHN S. COX
630 American Heritage Life Bldg.
Jacksonville, Florida 32202

Attorney for Respondent

INDEX

	Page
Opinions Below	1
Statement of the Case	2
Statement of the Facts	4
Question Presented	9
Argument	10
Conclusion	18
Certificate of Service	19

TABLE OF CASES

Page

Atlantic Coast Line Railroad Company v Dixon, 189 F 2d 525 11

Atlas v Eastern Air Lines, Incorporated, 311 F. 2d 156 17

Brady v Southern Railway Company, 320 U.S. 476, 88 L. Ed 239 13

Burch v Reading Company, 240 F. 2d 574, cert. den. 353 U.S. 965, 1 L.Ed 2d 914 11

Carr v Corning, 182 F. 2d 14 17

Chicago & Northwestern Railway Company v. Bower, 241 U.S. 470, 60 L. Ed 1107 11

Dessi v Pennsylvania Railroad Company, 251 F. 2d 149, cert. den. 356 U.S. 967, 2 L. Ed 2d 1073 12

Doff v Brunswick Corporation, 372 F. 2d 801 17

Eckenrode v. Pennsylvania Railroad Company, 335 U.S. 329, 93 L. Ed. 41 13

Holl v Talcott, 191 So. 2d 40 10

Moore v Chesapeake & Ohio Railway Company, 340 U.S. 573, 95 L.Ed 547 13

Patton v Texas and Pacific Railway Company, 179 U.S. 658, 45 L. Ed 361 12

Ray v Seaboard Air Line Railroad Company, 205 So. 2d 537 1

River Plate and Brazil Conferences v. Pressed Steel Car Company, Inc., 227 F. 2d 60 17

TABLE OF CASES (Continued)

Page

Rogers v. Missouri Pacific Company, 352 U.S. 500, 1 L. Ed 2d 493 12

Seaboard Air Line Railroad Company v. Gentry, 46 So. 2d 485 11

Seaboard Air Line Railroad Company v. Horton, 233 U.S. 492, 58 L. Ed 1062 11

Statutes Cited

Federal Employer's Liability Act, Title 45, U.S. Code, Sec. 51, et. seq. 2, 11

Federal Safety Appliance Act, Title 45, U.S. Code, Sec. 1, et. seq. 2

Motor Vehicle Safety Standard No. 208, 23 CFR, Sec. 255.21 17

National Traffic and Motor Vehicle Safety Act of 1966, Public Law 89-563, Title 23, U.S. Code, Chapter 2 17

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the First District Court of Appeal is reported at 205 So.2d 537 and is set out in Appendix A of the Petition for Writ of Certiorari. The order of the Supreme Court of Florida denying certiorari, entered on May 3, 1968, is yet unreported but is set out in Appendix B of the Petition.

STATEMENT OF THE CASE

As stated in the Petitioner's Statement of the Case in his Petition, this is a case under the Federal Employers' Liability Act, Section 51, et seq., Title 45, United States Code. The allegations in the original Complaint designed to allege a cause of action under the Federal Safety Appliance Act, Title 45, United States Code, were dismissed or stricken by the trial Court (R. 5-6) upon proper motion and no complaint has been made or question raised in any appellate proceeding, including this one, as to the correctness of such order.

The remaining allegations of negligence on the part of the Respondent were:

> 1. That the Defendant negligently furnished the Plaintiff a dangerous and unsafe place at or upon which to work (the motor car involved).
>
> (Par. 1(a), Count II of Complaint; R. 3)

> 2. That the Defendant negligently failed to provide the Plaintiff with a reasonably safe place to work and with reasonably safe working conditions (by providing him with the motor car upon which he was working at the time of the accident).
>
> (Par. 1(b), Count II of Complaint, R. 3)

> 3. That the Defendant negligently failed to provide the Plaintiff with a reasonably safe place within which to work (a reasonably safe motor car) and with reasonably sufficient and proper equipment with which to perform his duties (Again, the motor car in question).
>
> (Par. 1(c), Count II of Complaint, R. 3)

> 4. That the Defendant negligently failed to provide the Plaintiff with a motor car which contained a handrail, bar, handhold, grabiron, or any other reasonable and safe means by which Plaintiff could retain his position and hold to or secure his position upon the motor car in the event of a sudden movement or detailment which might cause the Plaintiff to fall from said motor car.
>
> (Par. 1(d), Count II of Complaint, R. 3)

By its Answer (R. 7-8) the Respondent denied that it was guilty of any negligence alleged in the Complaint. The Answer contained a separate defense that the accident was caused solely by the negligence of the Petitioner and a further defense that the Petitioner's negligence contributed to the accident and his alleged injuries and that his right to recovery should, accordingly, be reduced thereby.

The procedural aspects of the case after the filing of the Answer are that when Respondent filed and served its Motion For Summary Judgment on April 12, 1967 (R. 9) it also attached to that Motion and filed and served upon the Petitioner the Affidavits of L. E. Conner and Neil G. McDonald, (R. 11-19). *No opposing affidavits* were filed by Petitioner and the Motion for Summary Judgment was heard by the trial Court on May 10, 1967, upon which date the trial Court entered its Summary Final Judgment in favor of Respondent (R. 69-70). It is that judgment which Petitioner seeks to have reversed.

STATEMENT OF THE FACTS

On May 3, 1962, the Petitioner was employed as a Section Foreman for the Seaboard Railroad (R. 27). Four men were under his supervision at that time and he was operating out of Waldo, Florida, charged with the duty of inspecting and maintaining trackage from Starke, Florida, to Lochloosa, Florida (R. 27-28). Prior to becoming a Section Foreman he had been Main Gang Foreman operating in the same area and he was very familiar with the trackage in the Waldo area (R. 28).

On the morning of May 3, 1967, the Petitioner went to work at 8:00 o'clock A.M. and met his men at the car house located adjacent to the depot in Waldo. On that morning he was going to use a regular inspection motor car, taking two of his men with him, and inspect the main line tracks running South from Waldo, Florida. The motor car was placed on the tracks headed South and Petitioner positioned himself on the very rear of the car on the left-hand, or east side, in order to operate the motor car, with his two helpers seated on the front of the motor car, one on the east side and one on the west side, seated sideways. Petitioner was entirely occupied with operating the motor car and was depending upon his two helpers on the front end of the motor car to actually visually inspect the tracks, tie rails, bolts, etc., as the motor car moved southward over the tracks (R. 29-33).

The motor car which had been furnished to Petitioner for his use and which was being used by him that morning was a Fairmont Model M19AA motor car manufactured by Fairmont Railway Motors, Inc. of Fairmont, Minnesota (R. 12, 17, 65-68), and is shown in the four photographs attached to Petitioner's deposition (R. 65-68).

The maximum speed of the motor car was 45 miles per hour and the throttle, gear and brake control levers were located just in front of the operator's seat position and designed for hand operation (R. 18, 30, 33-35, 65-68).

The normal speed Petitioner usually traveled on the motor car while inspecting tracks in the area where this accident happened was 15 or 20 miles per hour (R. 34), but at the time the accident happened Petitioner was operating the motor car at less than 15 miles per hour (R. 35).

Petitioner and his two section laborers left the car house at Waldo traveling south on the motor car at approximately 8:15 A.M. on May 3, 1962 (R. 39). The weather was clear and there was no smoke, fog or haze to obstruct visibility (R. 43).

Just after leaving the car house and just prior to the accident the Petitioner had slowed the motor car down as it approached a grade crossing in Waldo, but didn't stop (R. 33-34). After traversing the crossing the Petitioner engaged the forward gear, "opened up the gas" and was increasing his forward speed (R. 34). After traveling 150 to 200 feet south of the crossing the Petitioner felt the motor car shudder, immediately looked down through an opening surrounding his gear and throttle controls, and saw that the motor car had hit a dog (R. 34-35). At that time the motor car was on a curve with the high banked side to the right, or west, and the low side to the left, or east. Immediately after impact with the dog the motor car partially derailed to the west or high side, the Petitioner fell off and was injured (R. 34-37, 39, 41).

The motor car traveled about 60 feet after the impact and came to a stop upright. The two section laborers who were riding the front end of the motor car (one on either side)

rode the car to a standstill and were not thrown off (R. 36, 40, 63).

At the time Petitioner felt the motor car shudder he had his right hand on the brake lever and was either reaching for the throttle with his left hand or had his left hand on the gear lever (R. 37-38).

Petitioner never saw the dog prior to the impact (R. 35). There were no trees on the railroad right-of-way in the area to obstruct visibility (R. 41), and the roadbed in that area was 25 feet wide, with a clear sloping shoulder of 8 to 10 feet wide on either side of the tracks (R. 31-32).

The particular motor car which was being used on the morning of the accident is shown in the four photographs attached to Petitioner's deposition (R. 65-68) and it had been bought new by the railroad from Fairmont Railway Motors, Inc. of Fairmont, Minnesota, on May 8, 1959 (R. 12, 17). After it had been inspected and the rail sweeps attached just forward of the front wheels it was shipped on August 6, 1959, from Hamlet, North Carolina, to Waldo, Florida, for use by the Section Foreman stationed at Waldo (R. 12). Nothing further was added to or taken from said motor car after its arrival in Waldo, with the exception of the addition of the two "sanders" on the front end of the car (R. 12 65-68).

The motor car had been designed by its manufacturer and used by the railroad as a track inspection vehicle and for the purpose of transporting two or three section laborers as a light section car, or for both purposes (R. 12)

As of May 3, 1962, the railroad had a total of 25 motor cars in use over its system identical in all respects to the motor car which Petitioner was using that morning; and the railroad had a total of 225 motor cars in use on its system

as of May 3, 1962, with the same basic design as the motor car being used on that date by the Petitioner, having the same dimensions, equipped with the same safety rails on front and rear, and operated in the same manner (R. 12-13).

Mr. L. E. Connor, the Supervisor of Work Equipment for the railroad, whose duty it was to select and purchase all work equipment (including motor cars) for use over Respondent's railroad system (R. 11) identified the four photographs attached to Petitioner's deposition (R. 65-68) as depicting the identical motor car which Petitioner was using on the morning of May 3, 1962 (R. 12) and the Petitioner himself identified such photographs as either the identical car he was using or one similar in design (R. 58-62).

For the past 20 years there have been only five manufacturing concerns furnishing and manufacturing motor cars for use by railroads and over that period of time Mr. Connor, based upon personal examinations and inspections, has found that the motor cars manufactured by Fairmont Motors, Inc. (the concern from which this particular motor car was purchased) are the best designed and most efficient motor cars produced and available to the railroads operating in the United States of America.

The registered mechanical engineer, Mr. Neil J. McDonald, who was instrumental in and who personally participated in the engineering studies leading to the design and ultimate manufacture of this particular motor car, executed an affidavit which was filed by Respondent in support of its Motion for Summary Judgment (R. 15-19). Among other factors or considerations entering into the engineering design studies on this particular motor car was the location, size and design of the front and rear safety rails, so as to provide safety for the operator and passengers of the motor car and

yet not interfere with the load carrying capacity of the car, or with its operation (R. 17). Said motor car was designed in accordance with and in conformity to well-accepted and tried and tested sound engineering design principals; in accordance with accepted and standard safety principles; and in accordance with the requirements of the various railroads of the United States for whom said Motor car was designed (R. 17). The engineering design of the motor car, including the placement of both the forward and rearward safety rails, meets all the requirements of the Interstate Commerce Commission and any other regulatory Board or Body with reference to safety devices or safety precautions to be incorporated in the engineering design of motor cars intended for track inspection and limited gang transport purposes.

Since 1954, Fairmont Railway Motors, Inc. has built and sold to every major railroad in the United States, Canada and many foreign countries approximately 900 motor cars identical in all respects to the one which Petitioner was using at the time of the accident and approximately 3,000 additional motor cars with practically identical design insofar as the placement of the fore and aft safety rails are concerned (R. 18).

Mr. McDonald testified, by affidavit, that the rear safety rail on the motor car which Petitioner was using at the time of the accident is located directly behind the place where the operator sits and is designed to give the operator something to lean back against and something to hold onto in the event it should become necessary for him to hold onto said safety rail (R. 18). Mr. McDonald's further testimony was that the rear safety rail was so designed and located that an operator can reach behind him with his left arm and hook his left arm around the safety rail and, at the same time, operate the motor car with his right arm and hand;

or, in those cases when the operator of the motor car is using both hands on the operational levers, the operator has the levers (which are constructed of spring steel and are equipped with cast aluminum handles for a firm hand hold) to hold onto and thus prevent his falling or being thrown from the machine (R. 18).

Mr. McDonald, as an expert on engineering design and principles, and with especial reference to engineering design and principles on railroad motor cars, stated the expert opinion that this particular motor car which Petitioner had been furnished by the Respondent and which Petitioner was using at the time of the accident had been designed and constructed upon sound and accepted engineering principles; that all *reasonable* safety devices had been installed on said motor car; and that the rearmost safety rail on said motor car is reasonably adequate from a safety engineering standpoint to provide a handhold or handrail, or safety rail for the operator of such motor car to hold onto in order to prevent himself from being thrown from said motor car (R. 19).

No affidavits were filed by Petitioner in opposition to the affidavits of Mr. Connor and Mr. McDonald, and upon this state of facts and proofs the trial Court entered Summary Final Judgment in favor of the Respondent.

QUESTION PRESENTED

Only one point or question is involved here, and Respondent feels that it should be stated as follows:

UPON THE STATE OF THE RECORD AS IT EXISTED AT THE TIME OF THE SUMMARY JUDGMENT HEARING DID THE RESPONDENT MEET THE BURDEN OF CONCLUSIVELY PROVING THAT THERE DOES NOT EXIST GENUINE ISSUES OF MATERIAL FACT TO BE TRIED?

ARGUMENT

1. The first considering the allegations of negligence against Respondent in this case, as set out in our preceding Statement Of The Case, the sole allegation, though pleaded in various phraseology, was Respondent's alleged failure to exercise reasonable care in furnishing a reasonably safe motor car with which and upon which Petitioner was to perform his work.

For the purposes of its Summary Judgment motion, Respondent assumed the burden of proving that it did, in fact, exercise reasonable care in selecting and furnishing to Petitioner this particular motor car and that, moreover, said motor car was indeed a reasonably safe and efficient piece of equipment upon which and with which to work.

As stated by the Florida Supreme Court in the case of *Holl v. Talcott*, 191 So. 2d 40, which the lower Court cited in its opinion (Appendix A, Petition) at page 47:

> "Since the material issues in any cause are those which are relevant to the issues made by the pleadings, it follows that the movant's burden is limited to making the required showing *only as to those issues. Therefore, the movant may meet his burden by showing conclusively that he is not guilty of the negligence charged against him.*" (Emphasis supplied).

The pleadings, deposition of the Petitioner, photographs and affidavits on file clearly show that the Respondent in this case did, in fact, conclusively show that it was not guilty of the negligence charged against it.

While realizing that the quantum of proof necessary on the part of a plaintiff in an action under the Federal Employ-

ers Liability Act (Section 51, et seq., Title 45 USC) is not great, still the Act itself is still predicated upon negligence. The many cases construing the Act consistently hold that the Railroad employer is not an *insuror* of the safety of its employees. This is clearly stated in this Court's holding in the case of *Seaboard Air Line Railroad Company v. Horton*, 233 U.S. 492, 58 L. Ed. 1062, at 233 U.S. 501:

> ". . . . an employer is not a guarantor of the safety of the place of work or the machinery and appliances of the work; the extent of its duty to its employees is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workman."

See also *Burch v. Reading Company*, 240 F.2d 574, cert. den. 353 U.S. 965, 1 L.Ed.2d 914; *Atlantic Coast Line Railroad Company v. Dixon*, 189 F.2d 525; and *Seaboard Air Line Railroad Company v. Gentry*, 46 So.2d 485.

Bearing in mind Petitioner's allegation predicated upon alleged failure to use reasonable care in furnishing to him a reasonably safe motor car upon which and with which to work, the next question is: Just what was the Railroad's duty in the case at bar? This duty was clearly stated in this Court's opinion in the case of *Chicago & Northwestern Railway Company v. Bower*, 241 U.S. 470, 60 L.Ed 1107, wherein Mr. Justice Pitney, speaking for this Court, stated at 241 U.S. 473-474:

> "The rule of law is: The employer is under a duty to exercise *ordinary* care to supply machinery and appliances *reasonably* safe and suitable for the use of the employee, but is *not* required to furnish the *latest*,

> *best*, and *safest* appliances, or to discard standard appliances upon the discovery of later improvements, provided those in use are reasonably safe and suitable."
> (emphasis supplied)

See also *Patton v. Texas and Pacific Railway Company*, 179 U.S. 658, 45 L. Ed 361. This remains the law in relation to the Railroad's duty and has now been enlarged by either legislative act or judicial decree.

It should also be noted that, contrary to the inferences which Petitioner would attempt to interject in his brief, neither this Court, nor any other has ever ruled that a Court is precluded in an F.E.L.A. case from granting Summary Judgment to a railroad simply because of an allegation of negligence in the Complaint. In the case of *Dessi v. Pennsylvania Railroad Company*, 251 F.2d 149, cert. den. 356 U.S. 967, 2 L.Ed. 2d 1073, citing a decision of this Court in *Rogers v. Missouri Pacific Company*, 352 U.S. 500, 1 L. Ed. 2d 493, this Court pointed out that a plaintiff in an F.E.L.A. case *cannot* carry his burden of proof without evidence that the role of the defendant's negligence is a real one, and stated further that this Court's decision in the *Rogers* case is a persuasive indication that there has been no departure from the familiar and normal requirement of Federal jurisprudence that proof of probative facts from which negligence and causal relationship may reasonably be inferred *must* be presented. Accordingly, the historical function of the trial judge in screening the evidence and pleadings before him on a Summary Judgment motion to ascertain whether there is enough to persuade reasonable minds that *some* negligence of the employer contributed to the plaintiff's injury applies in F.E.L.A. cases, as in others; all as evidenced by numerous cases denying the claim of a plaintiff in an F.E.L.A. case as a matter of law. The possibility alone that in an F.E.L.A.

case a jury might *disbelieve* testimony or probative facts presented to the Court on Summary Judgment motion does not make the case submissible to it. See *Moore v. Chesapeake & Ohio Railway Company,* 340 U.S. 573, 95 L. Ed 547; *Eckenrode v. Pennsylvania Railroad Company,* 335 U.S. 329, 93 L. Ed 41; *Brady v. Southern Railway Company,* 320 U.S. 476, 88 L. Ed. 239.

Thus, in order to entitle it to a summary judgment in this case, the Respondent railroad's burden was the burden of showing conclusively that it *did,* in fact exercise reasonable care in selecting and furnishing to Petitioner a *reasonably* safe and efficient motor car upon which to work and with which to perform his duties.

This burden was met and carried by the affidavit of Mr. L. E. Conner, the Railorad's officer or agent charged with the responsibility of selecting and arranging for the purchase of such motor cars. This affidavit (R. 11-14) conclusively shows that this particular motor car was not just arbitrarily purchased and furnished to Petitioner without careful consideration being given to its safety and suitability for the work to be performed. To the contrary, the affidavit clearly and conclusively shows that *more* than reasonable care was exercised in its selection. Of the five manufacturing concerns in the United States producing motor cars over the past twenty years, the manufacturing concern which produced this particular motor car has manufactured the majority of *all* motor cars used by *every* major railroad in the United States (R. 13). Mr. Conner personally examined and inspected the motor cars produced by all five of the United States manufacturers over the past twenty years, and found upon this personal examination and inspection that the motor cars (including the particular model involved in this accident) manufactured by Fairmont Railway Motors, Inc., are the best

designed and most efficient motor cars produced and available to the railroads operating in the United States. A total of twenty-five motor cars of this same model and identical in all respects were purchased and placed in use on Respondent's railway system, and at least two hundred more cars of the same design, insofar as the location of safety features is concerned, were also purchased and placed in use on Respondent's railway system (R. 12-13).

Thus the Respondent has shown conclusively that in selecting and furnishing to the Petitioner this particular motor car, it selected the best designed, most efficient and safest piece of equipment available to it in the United States. *No* affidavits were presented by Petitioner contradicting this, nor did any other evidence before the trial Court at the time of the summary judgment hearing contradict the reasonable care which the Respondent exercised in selecting and furnishing this piece of equipment.

Carrying its burden a bit further, and perhaps beyond the actual requirements imposed upon it by law, Respondent proceeded further to show conclusively that the motor car which it had selected and furnished to Petitioner for his use was, in fact, a reasonably safe piece of equipment upon which and with which to work.

This was done in the affidavit of Mr. Neil J. McDonald (R. 15-19). Mr. McDonald is a well qualified mechnical engineer, not only by way of formal education but also by practical training over a span of thirty years, thereby entitling him to testify as an expert in the field of engineering design and principles, with special reference to railway motor cars (R. 15-17). He personally participated in the engineering studies leading to the design and ultimate manufacture of the motor car which was involved in this accident. Among

other considerations entering into the design of the motor car was the best place on the car for the location of front and rear safety rails, so as to provide safety for the operator and passengers of the motor car and yet not interfere with its load carrying capacity or operation. Approximately 900 identical motor cars have been built and furnished to every major railroad in the United States, Canada and many foreign countries, and approximately 3,000 similar cars with practically identical design, insofar as the placement of safety rails is concerned, have been manufactured and sold to all such major railroads. The rear safety rail was specifically designed and located so as to not only afford the operator a back rest, but to give him something to hold on to and to hook his left arm around when he operates the motor car with his right arm and hand. The hand operational levers are themselves designed with safety in mind, being constructed of heavy spring steel and cast aluminum, with cast aluminum handles providing a firm hand-hold for the operator in the event both his hands are occupied with the manipulation of the controls (R. 18). The design of this motor car, including the placement of both the front and rear safety rails, meets all of the requirements of the Interstate Commerce Commission and all other regulatory boards and bodies with reference to safety devices and safety precautions to be incorporated in the engineering design of motor cars for track inspection purposes (R. 19).

Mr. McDonald's expert opinion, which he was certainly qualified to give, is that this particular motor car was designed and constructed upon sound and accepted engineering principles; that all reasonable safety devices were installed on the motor car; and that the rear safety rail on the motor car is reasonably adequate from a safety engineering standpoint to provide a handhold, or a handrail or safety rail for the operator of such motor car to hold onto in order to

prevent himself from being thrown from said motor car (R. 19).

Again, *no* affidavits were presented by Petitioner contradicting such testimony, nor is there any contradictory testimony, or even contradictory inference, in the record.

Petitioner, in his brief, contends that the conclusionary and fragmentary statement in his deposition, to-wit: "Can't reach back there, in other words, too far back," (R. 37) is sufficient to contradict the affadivit testimony of both Mr. L. E. Conner and Mr. Neal J. McDonald, or at least to raise some sort of inference which would require the submittal of this case to a jury's consideration.

The fallacy of this argument is readily apparent when the deposition of the Petitioner is read. Petitioner places himself on the very rear left-hand side of the motor car, where the motor car operator sits (R. 32). He further testified definitely that at the time of the accident and immediately prior thereto *both* his right hand and his left hand were occupied in operating the controls of the motor car (R. 37-38). It is patently obvious and apparent that Petitioner never made any effort or attempt to reach the safety rail with his left hand, or with either hand, at the time and place of this accident. Thus, his one-line statement, "Can't reach back there, in other words, too far back," is nothing more than a self-serving type of conclusion and opinion, which has no probative value whatsoever.

2. Petitioner also urges in his Petition, and for the *first* time in this litigation, that the decision below "if permitted to stand, will materially frustrate the Congressional intent to afford injured railroad employees rights under the F.E.L.A." in that the decision is tantamount to holding "as a matter

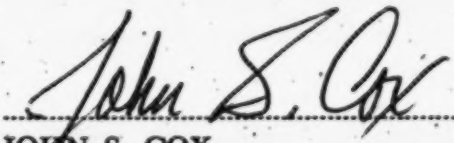
of law that the absence of *seat belts* for the operator of a motor inspection car constitutes no evidence of negligence on the part of the railroad". He cites the National Traffic and Motor Vehicle Safety Act of 1966, Public Law 89-563; Title 23, U.S.C. Chapter 2, and Motor Vehicle Safety Standard No. 208 (neither of which apply to any vehicles other than motor vehicles traveling on public highways) in support of his newly concocted contention that seat belts are reasonably required features on railroad motor cars. Respondent would point out that *never* have seat belts been required on any vehicle other than *motor vehicles traveling upon public highways* by either Congressional legislation, judicial decree, the Interstate Commerce Commission or any other regulatory body.

Respondent would also point out that the issue of *seat belts* has never heretofore been raised by Petitioner in *any* of the lower Courts by way of pleading, testimony, affidavit or otherwise. This is a completely new and novel theory raised in this Honorable Court rather tardily *and for the first time* in this rather extended litigation. Petitioner had ample opportunity to attempt the raising of this purported issue in the trial Court prior to hearing by the trial judge on Respondent's Motion For Summary Judgment, but completely failed to do so. Thereupon, Petitioner cannot create new issues by argument before the United States Supreme Court which were not presented to the trial Court at the time Summary Judgment was entered. Such issues, not having been timely submitted in the lower Court, cannot be reviewed on appellate proceedings and are waived. See *Carr* v *Corning*, 182 F 2d 14; *River Plate And Brazil Conferences* v *Pressed Steel Car Company, Inc.*, 227 F 2d 60; *Atlas* v *Eastern Air Lines, Incorporated*, 311 F 2d 156; *Doff* v *Brunswick Corporation*, 372 F 2d 801.

CONCLUSION

The Respondent has adequately carried its burden in the trial Court of conclusively showing the absence of any genuine triable issue of fact, and the Petitioner completely failed to come forward and present to the trial Court any sufficient evidence showing the existence of a genuine triable issue of material fact.

Accordingly, the Respondent respectfully submits that the entry by the trial Court of Summary Final Judgment was correct and that the Petition For Writ of Certiorari filed in this Court should be denied.



JOHN S. COX
830 American Heritage Life Bldg.
Jacksonville, Florida 32202

Attorney for Respondent

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that copy hereof has been furnished to James F. Lang, Esquire and William N. Avera, Esquire, P. O. Drawer "O", Gainesville, Florida, Attorneys for Petitioner, Clifford H. Ray, by U. S. Mail this 28th day of August, A. D. 1968.

John S. Cox

John S. Cox
Attorney for Respondent